

# Probate Fees

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## Summary of Fee Control Approaches – State by State

In many states, probate fees are what a court approves as "reasonable." In a few states, the fees are based on a percentage of the estate subject to probate. While most probate cases involve no conflict, no contesting parties, and none of the usual reasons for court proceedings, a probate attorney's fees for a "routine" estate with a gross value of \$400,000—typically a home, a car and some savings—can easily reach above \$20,000. Such fees are common in both "reasonableness" and "percentage" states.

In addition to tying up the estate for significant periods of time, probate is expensive. Matters that often involve primarily clerical duties—rarely calling for sophisticated legal research, drafting, and adversarial skills—can quickly eat up large amounts of an estate. The probate attorney, or the attorney's secretary, fills in a small mountain of forms and keeps track of filing deadlines and other procedural technicalities. In some states, the attorney makes a few routine court appearances; in others, the whole procedure is handled by mail.

Most states sampled have adopted some variation of a "reasonableness" standard approach to policing probate fees, either by adopting the Uniform Probate Code (UPC) partially or in its entirety. However, outlier states such as California mandate statutory fee schedules for ordinary probate matters.

**Reasonableness Approach – UPC.** Most states follow some variation of the Uniform Probate Code (UPC),<sup>1</sup> which was designed to shorten and simplify the probate of estates. Most recently revised in 2003, the UPC was intended for adoption by all 50 states, although only 20 states have adopted it in its entirety. The remaining states have adopted various portions of the code piecemeal, but even among the adopting jurisdictions, there are variations from state to state, some of which are significant.

Common criticisms of the "reasonableness" approach include the awkward and vulnerable position it puts bereaved survivors in to negotiate with attorneys what a "reasonable" fee is, particularly when many cases entering probate often involve a lack of estate planning and what may become a complex winding-down process. In short, attorneys are in a vastly superior bargaining position that is only strengthened by a lack of close court supervision.

### States that have adopted the Code in its entirety:

Alaska, Arizona,  
Colorado, Hawaii, Idaho,  
Maine, Massachusetts,  
Michigan, Minnesota,  
Montana, Nebraska, New  
Jersey, New Mexico,  
North Dakota,  
Pennsylvania, South  
Carolina, South Dakota,  
Utah, Wisconsin

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<sup>1</sup> See relevant UPC provisions below. Full text can be found at:

<http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.htm>. List of all estate and probate laws by state found at:  
<http://estate.findlaw.com/probate/probate-court-laws/estate-planning-law-state-probate.html>.

**Fee Schedules.** A minority of states, such as California and Nevada, follow statutory fee schedules.<sup>2</sup> In California, for example, attorneys for personal representatives are mandated to receive fixed percentages based on the value of the estate for “ordinary services,” and may seek additional compensation for “extraordinary services.” Nevada courts follow a “reasonableness” standard for attorney compensation while allowing attorneys to request compensation according to a designated fee schedule.

The “fee schedule” approach is most commonly criticized for imposing a “floor” on attorneys’ fees in probate, making it prohibitively expensive and draining estates that are forced to go through the process. In practice, attorneys may be tempted to commonly seek “extraordinary service” fees for what would otherwise be considered ordinary services.

### State By State Comparison<sup>3</sup>

West	Middle	East
<b>California</b> – Fee Schedule West’s Ann. Cal. Prob. Code §§ 10810 – 10814.	<b>Minnesota</b> -- Just and reasonable compensation; 5 factors for consideration when there is no prior agreement; Value of the estate is not a controlling factor. Minn. Stat. § 525.515	<b>Connecticut</b> – Just and reasonable expenses allowed
<b>Nevada</b> – Fee Schedule Nev. Rev. Stat. §§ 150.060-150.067 <a href="http://www.leg.state.nv.us/NRS/NRS-150.html#NRS150Sec060">http://www.leg.state.nv.us/NRS/NRS-150.html#NRS150Sec060</a>	<b>Missouri</b> —Just and reasonable Mo. Stat. § 475.265	<b>Florida</b> – Has adopted UPC: no specific section dealing with attorney’s fees.
<b>Hawaii</b> – UPC; no specific section dealing with attorney’s fees.	<b>Nebraska</b> – Reasonable Neb. Stat. §30-2481	<b>Maine</b> – Has adopted UPC: no specific section dealing with attorney’s fees.
<b>Idaho</b> – UPC; no specific section dealing with attorney’s fees.	<b>Illinois</b> – Reasonable Ill. Stat. § 5/27-2	<b>New Hampshire</b> – No specific regulation found, reasonable expenses in good faith.
<b>Wyoming</b> – Fee Schedule See Title 2, Chapters 2, 6, 7 <a href="http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title2/Title2.htm">http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title2/Title2.htm</a>	<b>Texas</b> – Reasonable Tex. Stat. § 666	

<sup>2</sup> CA’s fee schedule mandates: (1) 4% on the first \$100,000; (2) 3% on the next \$100,000; (3) 2% on the next \$800,000; (4) 1% on the next \$9,000,000; (5) 0.5% on the next \$15,000,000; and (6) For all amounts above \$25,000,000, a reasonable amount to be determined by the court. *See* California Probate Code §§10810-10814 (West’s Ann. Cal. Prob. Code); and Nev. Rev. Stat. §§ 150.060-150.067, respectively.

<sup>3</sup> See more detail of listed states below; and Comparison Chart of all 50 States:

<http://www.efmoody.com/estate/probate.html>

## UPC Provisions Related to Compensation/Expenses

**3-719. Compensation of Personal Representative.** A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the Court.

**COMMENT --** This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

**3-720. Expenses in Estate Litigation.** If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

**COMMENT --** Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.

## PART 4 -- PROTECTION OF PROPERTY OF PROTECTED PERSON

**5-417. Compensation and Expenses.** If not otherwise compensated for services rendered, a guardian, conservator, lawyer for the respondent, lawyer whose services resulted in a protective order or in an order beneficial to a protected person's estate, or any other person appointed by the court is entitled to reasonable compensation from the estate. Compensation may be paid and expenses reimbursed without court order. If the court determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount must be repaid to the estate.

**COMMENT --** This section establishes a standard of reasonable compensation for both guardians and conservators as well as for the respondent's lawyer and any one else appointed by the Court in a guardianship or protective proceeding. Factors to be considered by the Court in setting compensation will vary depending on the professional or fiduciary role filled by the person making the request. Rates of compensation may also vary from state to state and at different locales within particular states.

This section is derived from UGPPA (1982) Section 2-313 (UPC Section 5-413 (1982)), but a number of matters left open in the prior version now have been addressed. First, guardians are expressly added to the list of those who are entitled to compensation from the estate. Previously, the guardian's right to compensation was mentioned only in Parts 2 and 3. *See* Sections 5-209(a), 5-316(a). Second, the section sets out more clearly which lawyers are entitled to compensation. The respondent's lawyer, as well as the lawyer whose services resulted in a protective order or any other order of benefit to the estate are entitled to compensation and reimbursement for costs advanced. For example, a lawyer whose services resulted in the removal of an abusive conservator might be entitled to compensation under this provision. Third, while compensation may be paid from the estate without Court order, excessive or inappropriate payments must be repaid to the estate.

While the size of the estate is an important factor in setting compensation, in many cases there will be no estate or the estate will not be sufficient to pay the costs of the initial proceeding. In that event the Court, without appointing a conservator, may simply divide the estate among those entitled to compensation or reimbursement. Sections 5-305 and 5-406 require a visitor to inform the respondent that attorney's fees and other expenses of the proceeding will be paid from the respondent's estate. If the respondent is found to be indigent, compensation and expenses authorized by this section typically will be paid from the general fund of county, or from whatever funding exists in the enacting state for indigent representation, such as legal aid, with the compensation most likely at a fixed rate.

For a list of factors relevant in determining a conservator's compensation, *see* Restatement (Third) of Trusts, § 38 cmt. c (Tentative Draft No. 2, 1999). Among the factors listed are skill, experience and time devoted to duties; the amount and character of the property; the degree of difficulty; responsibility and risk assumed; the nature and cost of services rendered by others; and the quality of the performance. *See also* Restatement (Second) of Trusts § 242 (1959). In setting compensation, the services actually performed and responsibilities assumed by the conservator should be closely examined. For example, an adjustment in compensation may be appropriate if the conservator had delegated significant duties. On the other hand, a conservator with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft No. 2, 1999).

The standard of reasonable compensation also applies if the estate has multiple conservators. The mere fact that the estate has more than one conservator does not mean that the conservators together are entitled to more compensation than had either one acted alone. Nor does the appointment of multiple conservators mean that the conservators are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it should be divided depend on the totality of the circumstances. Factors to be considered include the Court's reasons for appointing multiple conservators and the level of responsibility assumed and exact services performed by each.

This section authorizes the payment of compensation from the respondent's estate even if no guardian or conservator is appointed or other protective order entered. Those entitled to compensation in that case are persons appointed by the Court in connection with the proceeding, including the [visitor], the respondent's lawyer, and the doctor or other professional appointed to perform an evaluation. However,

other law in the enacting jurisdiction may grant the respondent a right to reimbursement should the petition be totally without merit.

A guardian or conservator acting as a representative payee of the ward's or protected person's Social Security benefits may not be paid a fee from Social Security funds. Both Titles II and XVI of the Social Security Act limit the use of the funds to basic necessities. The only time that a fee may be taken is if the guardian or conservator is an "organizational payee" approved by the Social Security Administration.

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